UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	**CASE NUMBERS**
JONATHAN D. OWENS,	:	BANKRUPTCY CASE 04-13466-WHD
DEBTOR.	:	
TRANSPORTATION ALLIANCE BANK	:	ADVERSARY PROCEEDING NO. 05-1020
Plaintiff,	:	
v.	:	
JONATHAN D. OWENS,	:	
Defendant.	:	IN PROCEEDINGS UNDER CHAPTER 7 OF THE BANKRUPTCY CODE

O R D E R

Before the Court is a Motion for Summary Judgment, filed by Transportation Alliance Bank (hereinafter the "Plaintiff"). The motion is opposed by Jonathan Owens (hereinafter the "Debtor"). As this matter arises from a complaint objecting to the Debtor's discharge and to dischargeability of a particular debt, it constitutes a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 157(b)(2)(I)-(J).

FINDINGS OF FACT

1. On October 3, 2003, the Debtor provided a personal financial statement to the Plaintiff (hereinafter the "Financial Statement"). Plaintiff's Statement of Material Facts, ¶ 3; Debtor's Statement of Material Facts, ¶ 3.

2. On July 22, 2004, the Debtor provided a financial statement and loan application to the Plaintiff (hereinafter the "Financial Statement and Loan Application"). Plaintiff's Statement of Material Facts, ¶ 4; Debtor's Statement of Material Facts, ¶ 4.

3. At the time the Debtor submitted the Financial Statement and the Financial Statement and Loan Application (collectively the "Loan Application"), the Debtor knew that the Plaintiff would rely upon these documents to determine whether to extend credit to the Debtor. Plaintiff's Statement of Material Facts, ¶ 5.

4. The Plaintiff relied upon the Financial Statement and the Financial Statement and Loan Application when determining whether to extend credit to the Debtor. Plaintiff's Statement of Material Facts, ¶ 6.

5. The Debtor executed a promissory note, and the Plaintiff transferred to the Debtor a tractor and trailer. Plaintiff's Statement of Material Facts, ¶ 7; Debtor's Statement of Material Facts, ¶ 7.

6. On November 1, 2004, the Debtor formed the corporation Circle O Trucking, Inc. Prior to that time, the Debtor had been doing business in the form of a sole proprietorship under the name Circle O Trucking. Plaintiff's Statement of Material

Facts, ¶ 13; Debtor's Statement of Material Facts, ¶ 13.

7. On November 11, 2004, the Debtor notified account debtors for accounts sold by the Debtor to the Plaintiff that the payments for these debts should be made to Circle O Trucking, Inc., rather than to the Plaintiff.

8. The Plaintiff repossessed the tractor and trailer and sold them at auction.

CONCLUSIONS OF LAW

The Plaintiff seeks a declaration that a debt owed by the Debtor to the Plaintiff is nondischargeable pursuant to section 523(a)(2)(B) of the Bankruptcy Code, denial of the Debtor's discharge under section 727(a)(4) and (a)(5), and a judgment against the Debtor for conversion of accounts receivable. The Plaintiff is seeking summary judgment as to all claims.

A. *Summary Judgment Standard*

In accordance with Rule 56 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Rule 7056 of the Federal Rules of Bankruptcy Procedure, a party moving for summary judgment is entitled to prevail only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v.*

Catrett, 477 U.S. 317, 322. The moving party bears the initial burden of establishing that no genuine factual issue exists. *See Celotex*, 477 U.S. at 323; *Clark v. Coats & Clark, Inc.,* 929 F.2d 604 (11th Cir.1991). The movant must point to the pleadings, discovery responses or supporting affidavits which tend to show the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The Court must construe this evidence in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249 (1986); *Rollins v. TechSouth, Inc.,* 833 F.2d 1525 (11th Cir.1987). If the moving party satisfies its burden to show an absence of a genuine issues of material fact, no burden of going forward arises for the opposing party. *Clark,* 929 F.2d at 608. If the moving party satisfies its burden, the non-moving party must designate "specific facts showing that there is a genuine issue for trial." *Celotex,* 477 U.S. at 324.

B. *Section 523(a)(2)(B)*

The discharge of pre-existing debt is one of the most primary tenets of bankruptcy policy. Indeed, "a central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.'" *Grogan v. Garner*, 498 U.S. 279, 286 (1991) (citations omitted). At the same time, however, a

separate equitable policy mandates that any such mechanism for an unencumbered fresh start only should redound to the benefit of those debtors who are unfortunate, yet honest. *Id.* at 286-87. In light of these competing policy goals, Congress included the following provision in the Bankruptcy Code:

> (a) A discharge under section 722, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor of any debt–
>
> * * * *
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by--
>
> (B) use of a statement in writing . . . that is materially false . . . respecting the debtor's or an insider's financial condition . . . on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied . . . [,] and that the debtor caused to be made or published with intent to deceive.

11 U.S.C. § 523(a)(2)(B). Thus, through section 523(a)(2)(B), the Code offers a means of denying those individuals who do not qualify as "honest but unfortunate debtors" the benefits of a fresh start. *Id.* at 287. Like other exceptions to discharge, however, the provisions of section 523(a)(2)(B) warrant narrow construction. *See Gleason v. Thaw*, 236 U.S. 558, 562 (1915); *Schweig v. Hunter (In re Hunter)*, 780 F.2d 1577, 1579 (11th Cir. 1986). The plaintiff bears the burden of establishing non-dischargeability under section 523(a)(2). *Hunter*, 780 F.2d at 1579. To succeed under section 523(a)(2)(B), a creditor must establish that: 1) the debtor owes the plaintiff a debt for money, property,

or the extension of credit that was obtained by the debtor through the use of a written statement; 2) the written statement was materially false; 3) the written statement concerns the debtor's financial condition; 3) the plaintiff reasonably relied on the statement; and 5) the debtor published the writing with the intent to deceive the plaintiff. *See* 11 U.S.C. § 523(a)(2)(B); *In re Izaguirre*, 166 B.R 484 (Bankr. N.D. Ga. 1994) (Massey, J.).

There appears to be no question that the Plaintiff extended credit to the Debtor or that a debt remains outstanding. Accordingly, the first element is established. As to the third element, the parties also agree that the Debtor published the Financial Statement and the Loan Application and Financial Statement and that these documents constitute written statements concerning the Debtor's financial condition.[1]

However, as to the second element, the Debtor disputes that the financial statements submitted to the Plaintiff were "materially false." "A party demonstrates that a writing is materially false by evidence that the writing was false at the time it was created, the falsity was material in amount, and the falsity was material in the effect it had on the creditor receiving the writing such that it effected the creditor's decision making process." *In re Gordon*, 277 B.R. 805 (Bankr. M.D. Ga. 2001); *see also In re Wright*, 299 B.R. 648, 659 (Bankr. M.D. Ga. 2003). ("A falsehood is material if it is 'significant

[1] It should be noted that the Debtor does dispute that these two documents were the *only* financial information provided by the Debtor to the Plaintiff. However, this fact is not relevant to the issue of whether the statements were published, but rather to the issue of whether the Plaintiff reasonably relied on the statements or whether the statements contained materially false information.

in both amount and effect on the creditor receiving the financial statement'"; the false information must have "'actual usefulness to the creditor receiving the financial statement.'").

The Plaintiff contends that the Debtor's financial statements were false at the time he submitted them to the Plaintiff because the statements overvalued the Debtor's assets and understated his liabilities. Specifically, the Plaintiff alleges that: 1) the Debtor valued his real estate as being worth $530,000, when he did not own any real estate; 2) the Debtor stated that he owned a life insurance policy with cash surrender value of $500,000, when in fact, he owned a term life insurance policy with no cash surrender value; and 3) the Debtor stated that he had $322,000 and failed to disclose a claim of $175,000 asserted against him by HomeTown Bank. The Debtor's deposition establishes that the statements enumerated by the Plaintiff were in fact false at the time he made them in his financial statement. The Debtor testified that he did not own his residence at the time he completed the loan application, that the life insurance was in fact a term life insurance policy in the amount of $500,000, and that Hometown Bank had obtained judgment against him for $175,000 in October or November of 2004. *See* Deposition of Jonathan D. Owens, October 19, 2005, at 12, 17, 59.

As to the materiality of the statements, the Court recognizes that the amounts of the discrepancies are significant when compared to the amount of money lent. However, there appears to be insufficient evidence to establish that the false statements impacted

the Plaintiff's decision-making process. The Plaintiff submitted the testimony of John M. Conklin, who is the Plaintiff's general counsel, to the effect that the Plaintiff would not have made the loan to the Debtor if the Plaintiff had known that these statements were false. However, there is no evidence in the record to suggest that Conklin was personally involved in this loan transaction or any other evidence to establish how Conklin had personal knowledge of the Plaintiff's decision-making with regard to this loan.

Most importantly, there is insufficient evidence in the record to support a finding that the Debtor made these statements with the intent to deceive the Plaintiff. When asked why he failed to disclose the $175,000 judgment, the Debtor responded that the judgment had been obtained as the result of a guarantee of a debt from his wife's business and he did not think about listing it on his own financial statement. *See* Deposition of Jonathan D. Owens, at 59; *see also* Affidavit of Jonathan Owens at ¶ 14 (stating that he didn't really think of it as his debt). Other than the fact that the judgment was not disclosed, the Plaintiff has presented no evidence that the Debtor intentionally failed to disclose the judgment.

As to the failure to disclose that he did not own his residence, the Debtor's affidavit and deposition testimony state that, at the time he completed the loan application, he and his wife were in the process of purchasing the residence under a three-year owner financing arrangement with the intention of obtaining permanent financing from a third party at the end of the three-year period. *See* Deposition at 13-16; Owens Affidavit, ¶¶ 7-8. Neither the Debtor's testimony nor any other evidence submitted

supports the conclusion that the Debtor stated that he owned the property with the intention to deceive the Plaintiff. In fact, the Debtor testified that he provided Steve Parker, the Plaintiff's representative, with a copy of a document that contained the terms of the three-year financing arrangement. Assuming the Debtor's testimony is truthful, which this Court is required to do on a motion for summary judgment, this fact would support the conclusion that the Debtor did not intentionally mislead the Plaintiff as to his legal ownership of the property. If he had intended to do so, it would be highly ineffective to provide a document to the Plaintiff's representative that would call into question the veracity of that disclosure.

Finally, as to the life insurance policy, the Debtor likewise testified that he did not know the difference between term life insurance and life insurance that has a cash surrender value. If true, this fact could support the conclusion that the Debtor mistakenly stated that the policy had a value of $500,000 when he intended to disclose that it was a $500,000 policy. In his deposition, the Debtor stated that he told Parker that the policy only had cash value if the Debtor were dead. *See* Deposition at 17; *see also* Owens Affidavit at ¶ 9. The Debtor also claims that he faxed the first page of the policy to Parker and provided him with the insurance agent's phone number to call in case Parker had any questions. Deposition at 17-18; Owens Affidavit at ¶ 9. Again, these actions are inconsistent with those one would expect someone to take if they were making a false statement with the intent to deceive.

The Plaintiff's reasonable reliance on these statements is also called into question

by the Debtor's uncontroverted testimony that he provided documentation and oral statements to the Plaintiff's representative that may have caused the Plaintiff to question the accuracy of the financial statement. "The reasonable reliance analysis is done on a case-by-case basis considering the totality of the circumstances." *In re Wright*, 299 B.R. at 659 (citing *Agribank, FCB v. Gordon* (*In re Gordon*), 277 B.R. 805, 810 (Bankr. M.D.Ga. 2001). When considering the totality of the circumstances, the Court may include: 1) whether the creditor followed its established lending procedure in renewing the loan application; 2) whether the creditor verified the financial statements through outside sources; 3) whether the creditor had a previous relationship with the debtor; and 4) whether the financial statements contained any "red flags" that would have alerted the creditor to potential inaccuracies. *Id.* at 659-60. In this case, the Debtor's deposition testimony certainly raises questions as to the Plaintiff's reasonable reliance and whether the information supplied to the Plaintiff along with the loan application should have alerted the Plaintiff to the inaccuracies in his financial statement.

The Court finds that material questions of fact remain as to whether the statements made by the Debtor were material, whether the Debtor made the statements with the intent to deceive the Plaintiff, and whether the Plaintiff reasonably relied upon the statements. For this reason, summary judgment as to the section 523(a)(2)(B) claim would be inappropriate at this time.

C. *Section 727(a)(4) and (a)(5)*

When proceeding under section 727, the plaintiff bears the burden of demonstrating that a denial of discharge is warranted. *See* FED. R. BANKR. P. 4005; *see also In re Wines*, 997 F.2d 852, 856 (11th Cir. 1993). The plaintiff must satisfy this burden by a preponderance of the evidence. *Peterson v. Scott (In re Scott)*, 172 F.3d 959, 966-67 (7th Cir. 1999); *United States v. Hindenlang (In re Hindenlang)*, 164 F.3d 1029, 1034 (6th Cir. 1999); *Farouki v. Emirates Bank Int'l Ltd.*, 14 F.3d 244, 249 (4th Cir. 1994). Furthermore, the Court must interpret the applicable provisions of section 727 narrowly, so as to favor a presumption of the debtor's eligibility for a discharge. *Rosen v. Bezner*, 996 F.2d 1527, 1531 (3d Cir. 1993); *In re Burgess*, 955 F.2d 134, 136 (1st Cir. 1992); *Boroff v. Tully (In re Tully)*, 818 F.2d 106, 110 (1st Cir. 1987). "Completely denying a debtor his discharge, as opposed to avoiding a transfer or declining to discharge an individual debt . . . is an extreme step and should not be taken lightly." *Rosen*, 996 F.2d at 1530; *cf. Dilworth*, 69 F.2d at 624 ("[t]he reasons for denying a discharge to a bankrupt must be real and substantial, not merely technical and conjectural"). Additionally, litigation seeking the denial of a debtor's discharge under section 727 is rarely amenable to resolution at the summary judgment stage. *See United States v. Lenard (In re Lenard)*, 140 B.R. 550, 555 (D. Colo. 1992) (summary judgment is "particularly problematic" under section 727 since the issues "often require inquiry into the debtor's state of mind or justification for his actions, necessitating explanatory testimony by the debtor and an assessment of his demeanor and credibility").

With respect to section 727(a)(4), the plaintiff has the burden of proving that (1) the debtor knowingly made a false statement under oath or "presented or used a false claim"; (2) the statement is material to the bankruptcy proceeding; and (3) the debtor made the statement with a fraudulent intent. *Beaubouef v. Beaubouef (In re Beaubouef)*, 966 F.2d 174, 177-78 (5th Cir. 1992). For this purpose, a statement made in the debtor's bankruptcy schedules is considered an oath. *See id*.

In this case, the Plaintiff contends that the Debtor either made a false statement in his bankruptcy schedules or in the Loan Application, as statements in the documents contradict each other. The Court finds that the evidence of the inconsistency between the two documents is simply insufficient to satisfy the Plaintiff's evidentiary burden. If the statements made in the Loan Application were untrue and the statements made in the bankruptcy schedules were correct, the Plaintiff's section 727(a)(4) claim fails. Accordingly, summary judgment on this claim would be inappropriate.

The Plaintiff also alleges that the Debtor has failed to satisfactorily explain the loss or deficiency of his assets and should therefore be denied a discharge under section 727(a)(5). The Plaintiff points to the fact that, in the Loan Application, the Debtor stated that he owned real property and a life insurance policy with cash value, but when he filed his petition, the Debtor failed to list these assets.

Section 727(a)(5) provides that the court shall grant the debtor a discharge unless "the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's

liabilities." 11 U.S.C. § 727(a)(5). "Under § 727(a)(5), the plaintiff has the initial burden of identifying the assets in question by appropriate allegations in the complaint and showing that the debtor at one time had the assets but they are no longer available for the debtor's creditors . . . . Once the creditor has introduced some evidence of the disappearance of substantial assets, the burden shifts to the Debtor to explain satisfactorily the losses or deficiencies." *In re Brien,* 208 B.R. 255 (Bankr. 1st Cir. 1997); *see also In re Silverstein*, 151 B.R. 657 (Bankr. E.D.N.Y. 1993). The debtor is merely required to provide a satisfactory explanation of what happened, and is not required to put forth a satisfactory explanation as to why it happened. *Id*. at 663.

Here, the Plaintiff has not satisfactorily established that the Debtor had these assets. To the contrary, the Debtor's deposition testimony established that the Debtor never owned the real property and that he owned a term life insurance policy, rather than a policy with a cash surrender value. Accordingly, the burden has not shifted to the Debtor to explain the loss of those assets. Again, summary judgment is not warranted.

D. *Plaintiff's Claim for Conversion of Accounts Receivable*

The Plaintiff contends that the Debtor converted to his own use at least $20,000 worth of accounts receivable, which the Debtor had previously sold to the Plaintiff. The Debtor disputes this allegation. The Debtor admits that he did mail a notice to his current customers, which stated that he had severed his relationship with the Plaintiff and that all future payments should be sent to Circle O Trucking, Inc. *See* Affidavit at ¶ 10.

However, the Debtor contends that the letter was intended to apply to only those accounts receivable that had not been sold to the Plaintiff and that, in fact, the Debtor did not collect any accounts receivable that were sold to the Plaintiff. *See id*. ¶ 11. The Debtor's deposition testimony supports this contention and is sufficient to at least create a question of fact as to whether the Debtor converted the accounts.

CONCLUSION

For the reasons stated above, the Plaintiff's Motion for Summary Judgment must be, and hereby is, **DENIED.**

IT IS SO ORDERED.

At Newnan, Georgia, this _____ day of May, 2006.

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W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE